

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT TACOMA

RAFAEL RIVERA,

Petitioner,

V.

JEFFREY A. UTTECHT,

### Respondent.

No. 3:15-CV-5673-BHS-DWC

## REPORT AND RECOMMENDATION

**Noting Date: November 20, 2015**

The District Court has referred this action to United States Magistrate Judge David W. Christel. On September 18, 2015, Petitioner Rafael Rivera filed his federal habeas Petition, pursuant to 28 U.S.C. § 2254, challenging his 2006 Thurston County convictions. Dkt. 1-1. After review of the Court's records, the Court concludes this Petition is second or successive. The Court recommends the Petition be dismissed without prejudice. The Court further recommends the pending Motion to Proceed *In Forma Pauperis* be denied as moot.

## BACKGROUND

In 2006, Petitioner was convicted in the Thurston County Superior Court of five counts of first degree child molestation. Dkt. 1-1. In 2011, Petitioner filed a habeas petition (“First Petition”) in this Court seeking relief from the 2006 state convictions. *See Rivera v. Uttecht*, 3:11-cv-5693-RJB-JRC. In the First Petition, Petitioner raised grounds of ineffective assistance of counsel, Fourth, Sixth, and Fourteenth Amendment violations, and due process violations. *Id.*

1 The court found Petitioner's First Petition was procedurally barred and lacked merit, and the  
2 First Petition was denied.

3 Petitioner now files this Petition ("Second Petition") alleging his Sixth Amendment right  
4 to a public trial was violated. Dkt. 1-1, p. 5.

5 **DISCUSSION**

6 "The bar of successive petitions applies only to petitions adjudicated and denied on the  
7 merits in the previous federal habeas corpus proceeding." *Turner v. Terhune*, 78 Fed. Appx. 29,  
8 30 (9th Cir. 2003) (*citing Steward v. Martinez-Villareal*, 523 U.S. 637, 645 (1998)). "A  
9 disposition is 'on the merits' if the district court either considers and rejects the claims or  
10 determines that the underlying claim will not be considered by a federal court." *McNabb v.*  
11 *Yates*, 576 F.3d 1028, 1029 (9th Cir. 2009) (*citing Howard v. Lewis*, 905 F.3d 1318, 1322 (9th  
12 Cir. 1990). "[A] denial [of the first petition] on the grounds of procedural default constitutes a  
13 disposition on the merits and thus renders a subsequent § 2254 petition or § 2255 motion 'second  
14 or successive' [.]" *Henderson v. Lampert*, 396 F.3d 1049, 1053 (9th Cir. 2005) (internal citations  
15 omitted); *McNabb*, 576 F.3d at 1029. The Ninth Circuit also states "[a] habeas petition is second  
16 or successive only if it raises claims that were or could have been adjudicated on the merits."  
17 *McNabb*, 576 F.3d at 1029.

18 Petitioner filed his First Petition challenging the same 2006 Thurston County convictions  
19 challenged in the Second Petition. The court denied the First Petition "on the merits," as the  
20 grounds for relief were either: (1) procedurally defaulted or (2) denied after review on the merits.  
21 *See Rivera v. Uttecht*, 3:11-cv-5693-RJB-JRC. Further, in the Second Petition, Petitioner alleges  
22 his right to a public trial under the Sixth Amendment was violated during the 2006 trial because  
23 the court questioned jurors in chambers, closing jury selection to the public. Dkt. 1-1, p. 5.

1 Petitioner was or could have been aware of the factual predicate of this claim when his  
 2 conviction became final and could have raised this claim in his First Petition. The claim,  
 3 therefore, could have been adjudicated on the merits in the First Petition. *See Cooper v.*  
 4 *Calderon*, 274 F.3d 1270, 1273 (9th Cir. 2001) (finding a claim was “second or successive”  
 5 when the petitioner was aware of the factual predicate of the claim and could have raised the  
 6 claim in his first petition).

7  
 8 As Petitioner’s First Petition was denied “on the merits” and Petitioner was or could have  
 9 been aware of the claim asserted in the Second Petition prior to filing the First Petition, the  
 10 Second Petition is “second or successive.”

11 Before a petitioner is allowed to file a second or successive petition, he must obtain an  
 12 order from the Court of Appeals authorizing the district court to consider the petition. 28 U.S.C.  
 13 § 2244(b)(3)(A); Rule 9 of the Rules Governing Section 2254 Proceedings for the United States  
 14 District Court. A district court lacks jurisdiction to consider a second or successive petition in the  
 15 absence of an order from the Ninth Circuit authorizing the district court to consider the petition.  
 16  
 17 *See Magwood v. Paterson*, 561 U.S. 320, 331 (2010); *Burton v. Stewart*, 549 U.S. 147, 157  
 18 (2007). There is no evidence Petitioner has received an order from the Ninth Circuit authorizing  
 19 this Court to consider the Second Petition. Thus, the Court lacks jurisdiction to consider the  
 20 Second Petition and it should be dismissed without prejudice. *See Magwood*, 561 U.S. at 331;  
 21  
 22 *Cooper*, 274 F.3d at 1274.

23  
**CERTIFICATE OF APPEALABILITY**

24 A petitioner seeking post-conviction relief under 28 U.S.C. § 2254 may appeal a district  
 25 court’s dismissal of the federal habeas petition only after obtaining a certificate of appealability  
 26 (COA) from a district or circuit judge. *See* 28 U.S.C. § 2253(c). “A certificate of appealability

1 may issue . . . only if the [petitioner] has made a substantial showing of the denial of a  
2 constitutional right.” 28 U.S.C. § 2253(c)(2). Petitioner satisfies this standard “by demonstrating  
3 that jurists of reason could disagree with the district court’s resolution of his constitutional  
4 claims or that jurists could conclude the issues presented are adequate to deserve encouragement  
5 to proceed further.” *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003) (*citing Slack v. McDaniel*,  
6 529 U.S. 473, 484 (2000)).  
7

8 Reasonable jurists would not find it debatable that the Second Petition should be  
9 dismissed for lack of jurisdiction. Accordingly, this Court concludes Petitioner is not entitled to a  
10 certificate of appealability with respect to the Second Petition.

## 11 CONCLUSION

12 For the above stated reasons, the Court recommends the Second Petition (Dkt. 1-1) be  
13 dismissed without prejudice and the certificate of appealability be denied. The Court also  
14 recommends Petitioner’s Motion to Proceed *In Forma Pauperis* be denied as moot if the case is  
15 dismissed for lack of jurisdiction.

17 If Petitioner wishes to file a second or successive petition in this Court, he must obtain an  
18 order from the Court of Appeals authorizing the district court to consider the petition. 28 U.S.C.  
19 § 2244(b)(3)(A); Rule 9 of the Rules Governing Section 2254 Proceedings for the United States  
20 District Court. To obtain the necessary order, Petitioner must file an application for leave to file a  
21 second or successive petition with the Ninth Circuit Court of Appeals. The application must  
22 comply with Ninth Circuit Rule 22-3. To assist Petitioner and in the interest of justice, the Court  
23 recommends the Clerk be directed to send Plaintiff the Ninth Circuit Court of Appeals Form 12 –  
24 Application for Leave to File Second or Successive Petition Under 28 U.S.C. § 2254 or Motion  
25 Under 28 U.S.C. § 2255 and a copy of Ninth Circuit Rule 22-3.

1 Pursuant to 28 U.S.C. § 636(b)(1) and Fed. R. Civ. P. 72(b), the parties shall have  
2 fourteen (14) days from service of this Report to file written objections. *See also* Fed. R. Civ. P.  
3 6. Failure to file objections will result in a waiver of those objections for purposes of de novo  
4 review by the district judge. *See* 28 U.S.C. § 636(b)(1)(C). Accommodating the time limit  
5 imposed by Rule 72(b), the Clerk is directed to set the matter for consideration on November 20,  
6 2015, as noted in the caption.  
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8 DATED this 29th day of October, 2015.

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12 David W. Christel  
13 United States Magistrate Judge  
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